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No. 10-738

IN THE

Supreme Court of the United States

RITCHIE SPECIAL CREDIT INVESTMENTS, LTD., et al.,

Petitioners,

v.

THOMAS PETTERS, et al.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

What is most striking about the four briefs in opposition is that none even attempts to defend the rulings below with respect to *either* of the questions presented. None of the respondents claims that the Mandatory Victim Restitution Act (MVRA) allows a district court to deny restitution – as the court did here and as the Tenth Circuit has held over the Government's objection – based in part on the belief that "the victims have alternative avenues of relief available to them." Pet. App. 17; *accord United States v. Gallant*, 537 F.3d 1202, 1254 (10th Cir. 2008).[1] As for the second question presented, Respondent Petters and the Government affirmatively concede that the Eighth Circuit violated the Crime Victims Rights Act (CVRA) in denying mandamus without providing reasons in a written opinion. Petters BIO 12; Gvt. BIO 18-19.

Respondents nevertheless urge this Court to deny certiorari based on various grounds. None of their arguments withstands scrutiny. Contrary to respondents' primary contentions, the district court's

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[1] Respondent Petters argues at one point that "[t]he plain language" of the MVRA allows "a sentencing court to invoke the MVRA's complexity exception to deny restitution . . . ." Petters BIO 6 (internal quotation marks and citation omitted). But the issue here is not whether a district court may invoke the complexity exception. Rather, the issue is whether a district court that is invoking the complexity exception may consider the availability of alternative remedies in conducting the balancing test that the exception requires. Neither Petters nor any other respondent argues that a district court may do *that*.

decision plainly rests in part upon the perceived availability of alternative remedies. Petitioners clearly did not waive their right (even if such a waiver were possible) to have the Eighth Circuit provide reasons for its ruling in a written opinion. And the errors committed by the courts below not only affected the outcome here but also thwart Congress' carefully designed system of victim participation and appellate review under the CVRA.

It is worth reiterating that the district court's decision – and the Eighth Circuit's refusal to upset it – passes over at least "$10-20 million" of ill-gotten assets "available for restitution." Pet. App. 15. If this result in a case involving massive criminal fraud is allowed to stand, then Congress accomplished nothing by enacting the MVRA and the CVRA. This Court should grant certiorari and, at a minimum, summarily reverse and direct the Eighth Circuit to abide by the requirements of those Acts.

ARGUMENT

I. This Court Should Grant Certiorari to Hold That a Court May Not Deny Restitution Based in Part on the Availability of Alternative Remedies.

1. Respondent Bell (but not the Government or any other respondent) argues that petitioners waived the alternative remedies issue because they "never objected to the district court's consideration of alternative remedies." Bell BIO 4. This is incorrect. Petitioners expressly argued that "the fact that a victim is entitled to compensation from other sources may not even be considered in determining restitution" under the MVRA. Motion to Vacate

Restitution Order in No. 08-cr-304, Doc. 34, at 12. Petitioners also argued in other filings that the availability of alternative remedies was legally irrelevant. *See* Ritchie's Memorandum in Support of Victim Impact Statement, submitted in camera Feb. 24, 2010, at 28-29 (arguing that remission is irrelevant); Ritchie's Supplemental Memorandum in Support of Ritchie's Victim Impact Statement, submitted in camera March 19, 2010, at 4-10 (same); Ritchie's Reply in Support of Emergency Motion to Intervene, Doc. 438, at 7 (same).

2. Respondent Petters and the Government try to avoid review regarding the district court's reliance on alternative remedies by asserting that this was "not the determining factor" in the court's denial of restitution. Gvt. BIO 13; *see also* Petters BIO 7 (reliance on alternative remedies "was not a major consideration in the district court's reasoning"). "[T]he court's judgment," the Government even suggests, "was independently supported" by its assertion that any restitution would ultimately be roughly "'a penny of each dollar of victim loss.'" Gvt. BIO 13 (quoting Pet. App. 15); *see also* Petters BIO 7. These suggestions miss the mark on two levels.

First, the district court's decision plainly depends on its belief that petitioners may seek alternative remedies. The court asserted that the MVRA's complexity exception "calls for . . . a weighing of the burden that would be imposed on the court by adjudicating restitution in the criminal case *against the burden that would be imposed on the victim by leaving him or her to other available legal remedies.*" Pet. App. 16 (internal quotation marks and citation omitted) (emphasis added). The court also twice

discussed alternative remedies (among other factors), Pet. App. 15-16 & 17, before concluding "[f]or these reasons" that "the need to provide restitution is outweighed by the burden it would impose." Pet. App. 17.

When a district court "relie[s] on [a] factor[] that may not be considered," it commits an error of law that is *per se* an abuse of discretion. *Koon v. United States*, 518 U.S. 81, 100 (1996). Given that the MVRA precludes considering alternative remedies as part of the complexity exception's balancing test, the Eighth Circuit should have granted mandamus relief and ordered the district court to reassess the balance.

Second, there is every reason to believe that the outcome would have been different if the district court had known that it could not rely on alternate remedies. It obviously would require some judicial effort to calculate the proper amount of restitution. But much of the work has already been done. An independent accounting firm commissioned by the Receiver, for example, has already conducted a forensic accounting report showing the net losers (that is, the victims) from Petters' scheme and how much each is owed.

On the other hand, the only reason besides alternative remedies that the district court gave for finding that the burden of adjudicating restitution would outweigh the need to impose it was its belief, based on the defendants' current financial condition, that petitioners would be able to recover only about a "penny of each dollar" of their loss. Pet. App. 15. But petitioners lost over $165 million in the defendants' Ponzi scheme. Pet. for Cert. 3. That means that, even accepting the district court's initial estimations

regarding the defendants' assets, petitioners stand to recover roughly *$1.65 million*. This is hardly an insubstantial amount of money. Furthermore, a restitution order for the full amount of petitioners' losses would allow them to recover any additional amounts recovered in ongoing asset recovery proceedings,[2] or that the defendants earn over the next 20 years. *See* Pet. for Cert. 17, 19. These guaranteed and potential recoveries, which far exceed the stakes of a typical multi-year case in a federal district court, surely are worth a reasonably material expenditure of judicial resources.

3. The Government suggests that this Court should deny review because the Eighth Circuit's decisions affirming the district court are "unelaborated" and were "issued without opinions," and, therefore, do not "constitute precedential rulings." Gvt. BIO 13-14. To put it mildly, this suggestion is ironic in light of the Government's acknowledgement three pages later that "the court of appeals should have issued a written opinion" to explain its judgment because 18 U.S.C. § 3771(d)(3) "unambiguously requires a court of appeals to issue a written opinion when it denies relief to a litigant who has properly sought mandamus review of the district court's denial of its CVRA motion." Gvt. BIO 17, 19.

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[2] Given the extent of Petters' fraudulent enterprises, as well as the lengths to which he and his confederates went to conceal them and to hide their assets, it would not be at all surprising for these proceedings to uncover tens or even hundreds of millions in additional assets hidden in overseas bank accounts or other devices.

The fact that the Eighth Circuit's opinion violates the CVRA, as well as the MVRA, increases, not decreases, the need for review.

At any rate, the Government acknowledges that the Tenth Circuit has "squarely . . . held" that district courts may deny restitution based in part on the availability of alternative remedies. Gvt. BIO 14 (citing *United States v. Gallant*, 537 F.3d 1202, 1253 (10th Cir. 2008)); *accord* Petters BIO 7. Many district courts have held likewise. Pet. for Cert. 13-14. Surely this is enough "predecent[]" to warrant expending this Court's resources to correct a construction of the MVRA that neither the Government nor any other respondent is willing to defend.

4. Finally, Petters and the Government dispute petitioners' assertion (Pet. for Cert. 10-12) that decisions from the Ninth, First, and Fourth Circuits conflict with the Tenth Circuit's *Gallant* decision and the result here. Given that respondents are unwilling even to argue that courts may consider alternative remedies, it is not terribly important that petitioners show that some courts have rejected this erroneous view of the law. At any rate, the circuits are indeed in conflict.

The Government asserts that the Ninth Circuit's decision in *United States v. Cienfuegos*, 462 F.3d 1160 (9th Cir. 2006), does not unambiguously conflict with the result here because language in the opinion "focuses on '*the amount of restitution*,' rather than on whether the MVRA requires the court to enter any order of restitution (regardless of amount)." Gvt. BIO 15. The district court in *Cienfuegos*, however, had denied restitution entirely – not reduced the amount

– based on part on the availability of alternative remedies. 462 F.3d at 1163 So the Ninth Circuit's reversal of that opinion can be understood only as holding that a court may not consider alternative remedies in deciding whether to impose restitution.

More generally, even if the Ninth Circuit had been thinking only of the amount of restitution, the Government offers no reason why the MVRA would bar consideration of alternative remedies in calculating the amount of restitution, but allow such consideration in determining whether to award it in the first place. Nor does any logical reason exist.

Respondents also note that neither the Fourth Circuit's decision in *United States v. Alalade*, 204 F.3d 536 (4th Cir. 2000), nor the First Circuit's decision in *United States v. Hyde*, 497 F.3d 103 (1st Cir. 2007), involved the MVRA's complexity exception. Gvt. BIO 16; Petters BIO 8. This factual distinction is true enough. But, as the Government concedes, both decisions prohibit courts as a matter of law from considering the availability of alternative remedies in applying other provisions of the MVRA. *See* Gvt. BIO 16; Pet. for Cert. 11-12. And there is no apparent reason – and respondents offer none – why the MVRA would bar consideration of alternative remedies for some purposes but allow such consideration in deciding whether to undertake a restitution proceeding in the first place. Accordingly, it is apparent that this case would have come out differently in either of those courts.

II. This Court Should Grant Certiorari to Enforce the CVRA's Written Opinion Requirement.

1. Petters (but not the Government or any other respondent) asserts that even though petitioners made "a handful of references to the written opinion rule in their Petition for Mandamus," petitioners failed to preserve the issue for review in this Court because they did not list it in the "list of issues" in their brief to the Eighth Circuit. Petters BIO 10-11. This argument is specious. Litigants do not have to raise separate issues in their appellate briefs asking courts of appeals to follow basic appellate procedural rules (not even applicable in district courts) like the MVRA's written opinion rule – particularly when, as here, opposing litigants never ask the court to ignore the rule and the court gives no prior indication of its intent to do so.

At any rate, petitioners told the Eighth Circuit that "[p]ursuant to the Crime Victims Rights Act, . . . '[i]f the court of appeals denies the relief sought, the reasons for the denial shall be clearly stated on the record in a written opinion.' 18 U.S.C. § 3771(d)(3)." C.A. Br. in No. 10-3050 at 3. Petitioners further complained to the Eighth Circuit that it had denied its previous petitions for mandamus "without the separate opinion required by 18 U.S.C. § 3771(d)(3)," leaving them in a situation in which they could "only guess why it was denied." C.A. Br. in No. 10-3050 at

8. There is no basis for the notion that they were required to say anything more.[5]

2. Petters argues that a petition for certiorari "is not the appropriate vehicle" for review here because petitioners "seek to compel a lower court to perform a claimed mandatory duty." Petters BIO 11. Petters is mistaken. As the Government acknowledges, Gvt. BIO 2, this Court has jurisdiction under 28 U.S.C. § 1254(1), because petitioners seek review of a final judgment of a federal court of appeals. It makes no difference that petitioners seek review of a denial of a petition for mandamus. *See, e.g., Cheney v. U.S. Dist. Court for the Dist. of Columbia*, 542 U.S. 367, 376-77 (2004) (granting certiorari under § 1254(1) to review, and then reversing, a court of appeals' denial of mandamus); *Schlagenhauf v. Holder*, 379 U.S. 104, 109 (1964) (same).

By contrast, the "mandatory duty" procedure that Petters mentions is reserved for the circumstance in which a party that has prevailed in this Court seeks to compel an intransigent lower court to "execute [this Court's] mandate." *Vendo Co. v. Lektro-Vend Corp*, 434 U.S. 425, 427-28 (1978)

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[5] The Government's suggestion (Gvt BIO 19) that petitioners should have sought rehearing in order to justify obtaining review in this Court is likewise unfounded. This Court has never held that it is necessary for a litigant to seek rehearing before seeking certiorari in this Court. At any rate, petitioners expressly pointed out the written opinion rule to the Eighth Circuit and complained of its refusal to abide by it in the past. There would have been no use in complaining yet again.

(quoting *United States v. Fossatt*, 21 How. 445, 446 (1859)). That obviously is not the situation here.[4]

3. Petters and the Government lastly suggest that certiorari is unwarranted because "the statute is clear on its face" that a court of appeals must issue a written opinion with reasons if it denies mandamus relief under the CVRA. Petters BIO 12; Gvt. BIO 19 (noting that the statute is "unambiguous[]"). The Government adds to this that "nothing suggests that [the Eighth Circuit's refusal to issue a written opinion] reflects a recurring, systematic problem." Gvt BIO 19.

These assertions, however, support *granting* certiorari, not denying it. This Court's rules provide

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[4] The Government also asserts that "Petitioners did not file any [motion in the district court] to support their first three mandamus petitions." Gvt. BIO 17. This assertion is misleading. During the *in camera* restitution process ordered by the court pursuant to 18 U.S.C. § 3664(d)(4), petitioners submitted several motions asserting their right to restitution under the MVRA (arguing, among other things, that that the availability of other remedies, such as discretionary remission, could not substitute for their mandatory restitution rights), and requesting a hearing under the CVRA. *The court*, however, did not file them. Later, petitioners submitted additional motions to the district court objecting to its refusal to award restitution, but again *the court* refused to file them. Pet. for Cert. 7 & n 2.

In any event, the Government itself recognizes that this procedural history is irrelevant to this Court's ability to review this case and award the relief petitioners seek, for petitioners also submitted, and the district court duly filed and denied, a motion supporting its mandamus petition that produced the Eighth Circuit's ruling of September 24, 2010. Gvt BIO 18, Pet. App. 1-2.

that certiorari is appropriate when "a United States court of appeals . . . has so far departed from the *accepted and usual* course of judicial proceedings . . . as to call for an exercise of this Court's supervisory power." S. Ct. Rule 10(a) (emphasis added). That is exactly what the Eighth Circuit's summary denial of mandamus does here. If that the Eighth Circuit's refusal to issue a written opinion also inhibits this Court's plenary review of the first question presented, then the Eighth Circuit's decision is all the more intolerable. *See supra* at 5. This Court should not allow it to stand.

III. The "Standing" Objections That Bell and Katz Raise Are Not Pertinent Here.

Finally, Respondents Bell and Katz seek to evade the effect of a reversal from this Court by arguing that petitioners lack "standing" to recover restitution from them because petitioners were not victims of their crimes. Bell BIO 6-7; Katz BIO 2. Neither the district court nor the Eighth Circuit considered this argument. Hence, it can and should be left for remand.

In any event, such an argument cannot prevail, for two reasons. First, neither Bell nor Katz raised it below, so it is waived. (Although they label the argument as one involving "standing," it is subject to waiver because it really is just a question of causation. *See, e.g., United States v. Atl. States Cast Iron Pipe Co.*, 612 F. Supp. 2d 453, 462 (D.N.J. 2009).). Second, the argument lacks merit. Bell and Katz pleaded guilty to fraud in connection with the "Lancelot" scheme, and they concede that petitioners invested hundreds of millions of dollars in those

funds from 2002-05. Bell BIO 6-7; Katz BIO 2. Even though Bell's and Katz's fraudulent activity occurred later, in 2008, it still – in the words of the MVRA – "directly and proximately harmed" petitioners, 18 U.S.C. § 3663A(a)(2), by causing them to lose vast amounts of money from their investments. Neither the MVRA nor the CVRA requires anything more than that.

CONCLUSION

For the foregoing reasons, as well as those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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